MISCELLANY.

Malapropos.—At one of the Inns it is customary for the newly-called barristers to take a glass of wine in the Benchers' Room while the senior Bencher makes a speech to them. To the senior of the new candidates for the Woolsack (says the Globe), belongs the duty of making a suitable reply. Dr. Blake Odgers, K. C., in a lecture he gave the other day on the discipline of the Bar, entertained his audience by repeating the singular speech which a young barrister, who afterwards became a County Court judge, thought appropriate to the occasion. "It is very kind of you, Mr. Treasurer, and of the other Benchers present," he said, "to welcome us young men into the profession to which you yourselves belong. At first sight one might think that you would not be glad to welcome into the profession a set of young men, able and learned, fresh from their law books, and anxious at once to begin practice at the Bar. It might be thought they would cut into your work and diminish your earnings. But when I look at you all, gentlemen, I recognize that no such thoughts can really be entertained, because long before any of us get into substantial practice every one of you whom I see will be mouldering in the grave." And the Benchers did not like it.—London Law Journal.

Fraud in Inducing Purchase of Securities.—The New York Court of Appeals has recently rendered two notable decisions recognizing a right of recovery by persons who have been fraudulently induced to purchase corporate securities. The earlier of such determinations was that in Ottinger *v.* Bennett, 203 N. Y. 554, which has already been extensively noticed both in the legal and secular press. The court of last resort did not write an opinion, but adpoted the dissenting opinion of Miller, J., at the Appellate Division.[1] It was held that the declaration of a dividend not based on profits might amount to a fraudulent representation of the existence of profits, so that a person who had bought stock in reliance upon such representation might have a cause of action for fraud and deceit against the directors of the company. Mr. Justice Miller remarked that "a declaration of a dividend by a going concern implies earnings from which to pay it, and the publication of the facts of such declaration is certainly calculated to induce the public to believe that the dividend has been earned and that the corporation is prosperous. If intending the public to act thereon, the defendants had made and published a report expressly stating that the dividend declared had been earned, there would be no doubt of their liability to a person thereby deceived to his injury. The familiar cases of false prospectuses need not be cited."

1. 144 App. Div. 525-32.

Following the "familiar cases" of "false prospectuses" and clarifying and stiffening their doctrine, came the decision of the New York Court of Appeals in Downey *v.* Finucane.[2]

When Lord Herschell announced the judgment of the House of Lords in the famous case of Derry *v.* Peek, in 1889, the decision was received with such a storm of dissent from the public and the profession in England that the rule it established was almost immediately abrogated by Parliament, Lord Herschell himself, in his capacity of legislator, offering the bill. The principle which that decision affirmed was that if a party makes a statement intending that another shall believe it and act upon it, which statement is known to the party making it to be untrue, but which he nevertheless in good faith expects will turn out to be true by reason of something which he hopes will happen in the future, he is not guilty of actionable fraud. Sir Frederick Pollock, reviewing the decision, said that it ought to be disregarded by every tribunal which was at liberty to do so. Its fallacy, as he pointed out, was that it substituted general good intentions in issuing a document containing many statements of fact for a distinct belief in every one of those statements. The doctrine of Derry *v.* Peek never obtained any serious recognition from the courts of this country, although the Court of Appeals in New York came dangerously near throwing the doors wide open when it decided, in the case of Kountze *v.* Kennedy,[3] that a statement of the assets and liabilities of a corporation furnished by its president to an inquiring purchaser of stock which did not make any mention of a large judgment which had been entered against the corporation and which eventually was the cause of its bankruptcy was not an actionable fraudulent representation if the officer who made it believed, on the advice of his counsel, that the judgment against the corporation would be reversed on appeal.

The Court of Appeals soon returned to a higher ethical standard when it asserted, in Hadcock *v.* Osmer,[4] that where a party represents a material fact to be true to his personal knowledge, when he does not know whether it is true or not, and it turns out to be actually untrue, he is guilty of falsehood even if he believes it to be true, and if the statement is made with the intention that it shall be acted upon by another, who does so act upon it to his injury, the result is actionable fraud.

Now the Court of Appeals has gone still farther, and, in Downey *v.* Finucane, has laid down rules and principles applying to corporation prospectuses which are more rigid than those of any other court, either in this country or in England, with which we are acquainted. In this case the prospectus was signed by one of the agents of a syn-

2. New York Law Journal, April 23, 1912.
3. 147 New York 124.
4. 153 New York 604.

dicate of promoters formed to organize a telephone company, which was to take over the stocks of other corporations in which the promoters were interested. The Court of Appeals held that all the members of the syndicate, without reference to their moral guilt or innocence, were liable in damages for the fraudulent representations of the agent employed to sell the securities. The court also held that where a prospectus is circulated as an inducement to take stock in a corporate enterprise, the language of the prospectus is to be interpreted by the effect which it would produce upon an ordinary mind, and that in estimating the probability of subscribers being misled the jury may take into consideration not only the facts stated in the prospectus, but the facts suppressed. This latter principle was applied to the statement in the prospectus that the company owned a franchise for telephone purposes in the city of New York, the facts being that the franchise had been used for burglar alarm purposes only, had not been legalized by the consent of the Board of Aldermen, had cost the promoters only $250,000, and was sold by them to the company for $40,000,000 of stock. The court, by Judge Willard Bartlett, remarks that if these facts had been stated in the prospectus no careful investor would have been induced to put any money into the enterprise. Another statement in the prospectus was to the effect that $17,000,000 of bonds were to be issued "pursuant to contracts already made by the company and binding on it, as a result of the performance of which contracts the company would have $5,000,000 in its treasury." The contracts referred to turned out to be merely options given to the syndicate binding the company to sell, but obligating no one to purchase. It was contended by defendants that this literally fulfilled the representation, but the Court of Appeals swept away this sophistry by adopting the piquant language of Lord Halsbury in an English case: "I do not care by what means it is conveyed," referring to an equivocal statement, "nor by what trick or device of ambiguous language—all these are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false, although if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue."

In these recent decisions the court of last resort has shown a salutary aggressive spirit, disregarding mere form and grappling with substance. In giving principles of common sense and common honesty an express legal sanction, the Court of Appeals has rendered a substantial service to the business community and incidentally inspired respect for courts as instruments of justice.—The Lawyer and Banker.